

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

**LA RESOLANA ARCHITECTS, PA,
a New Mexico corporation**

Plaintiff,

vs.

Civ. No. 03-1337 ACT/RHS

**CLAY REALTORS ANGEL FIRE,
a New Mexico corporation, et al.,**

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Defendants' Plante and Clay and Reno, Inc., d/b/a Clay Realtors Motion to Dismiss and Memorandum of Authorities in Support Thereof filed March 8, 2004. Docket No. 14. Upon review of the pleadings and being otherwise advised in the premises, the Court finds that Defendants' Motion is well taken in part.

Legal Standard.

The court is required to accept as true all well-pleaded facts alleged in plaintiff's complaint when addressing a Fed.R.Civ.P. 12(b)(6) motion to dismiss. *Housing Auth. of Kaw Tribe. v. City of Ponca City*, 952 F.2d 1183, 1187 (10th Cir. 1991)(citations omitted) cert. denied 504 U.S. 912 (1992). A complaint may be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) only if the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *David v. City and County of Denver*, 101 F.3d 1344, 1352 (10th Cir 1996) cert. denied, 522 U.S. 858 (1997).

Discussion.

Plaintiff did not respond to the motion.¹ Pursuant to D.N.M.LR-Civ. 7.1(b) failure to respond to a motion constitutes consent to grant the motion. However, the Court must address the merits of the motion in determining whether a dismissal is proper under Fed.R. Civ.P. 12.(b)(6). *Reed v. Bennett*, 312 F.3d 1190 (10th Cir. 2002).

This action arises out of the promotion, sales and building of a residential community located in Angel Fire, New Mexico. Plaintiff asserts that Defendants used his design drawings to promote, sell and build a residential community. Plaintiff alleges two counts in his Complaint, copyright infringement and violation of New Mexico Unfair Trade Practices Act. Plaintiff further alleges that he has applied for Certificates of Registration for his architectural artwork. Complaint, ¶14.

Registration of a copyright is a prerequisite to the filing of an infringement action. 17 U.S.C. §411(a) (“no action for infringement of the copyright of any work shall be instituted until registration of the copyright claim has been made”). To prevail on a claim of copyright infringement, the Plaintiff must show: “(1) ownership of a valid copyright, and (2) copying by the defendant of protected components of the copyrighted material.” *Gates Rubber Co. v. Bando Chem Indus.* 9 F.3d 823 (10th Cir. 1993). Plaintiff has not alleged a valid copyright. Plaintiff has merely alleged that it has applied for a copyright. Thus, his claim for copyright infringement must be dismissed.

The Court does not find that a valid copyright is a prerequisite for Count II of Plaintiff’s

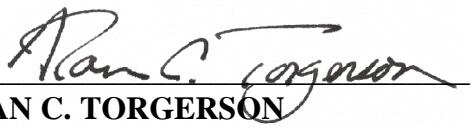
¹Local Rule D.N.M.LR-Civ. 7.1, requires the movant to determine whether a motion is opposed. The movant in this matter did not assert that Plaintiff opposed the motion. As Plaintiff did not respond to the Motion, it appears that the motion is unopposed and this could have been addressed in a stipulated order.

Complaint, Violation of New Mexico Unfair Trade Practices Act. Moreover, the Defendants, though arguing for a dismissal of the Complaint, do not point to any requirement of a valid copyright under the New Mexico Unfair Trade Practices Act. Nor do the Defendants argue any other ground for dismissal of Count II.

Count I has been asserted against all four Defendants. However, the Motion was filed on behalf of only three of the Defendants, Mr. Plante, Mr. Clay and Clay Realtors Angel Fire. As the same analysis would apply to the fourth Defendant, Angel Fire Home Design, Count I will be dismissed as to all Defendants.

IT IS THEREFORE ORDERED that Defendants' Plante and Clay and Reno, Inc. d/b/a Clay Realtors Motion to Dismiss and Memorandum of Authorities in Support Thereof is granted in part and denied in part.

IT IS FURTHER ORDERED that Count I of Plaintiff's Complaint alleging copyright infringement is dismissed without prejudice.



ALAN C. TORGERSON
UNITED STATES MAGISTRATE JUDGE